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 LIBERTY MUTUAL INSURANCE COMPANY

8 UNITED STATES DISTRICT COURT

9 NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION

11 LIBERTY MUTUAL INSURANCE	) Case No. C 06 2022 CW
COMPANY,	) NOTICE OF APPEAL
12 Plaintiff,	) Trial Date: March 10, 2008
13 vs.	) Judgment Entered: July 1, 2008
14 MICHAEL T. BLATT,	
15 Defendant.	

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16  
 17 NOTICE IS HEREBY GIVEN that Liberty Mutual Insurance Company,  
 18 plaintiff in the above-named case, hereby appeals to the United States Court of  
 19 Appeals for the Ninth Circuit from the judgment entered by the district court on July  
 20 1, 2008, and from the court's October 26, 2007 order denying plaintiff's motion for  
 21 summary judgment and granting in part and denying in part plaintiff's motion for  
 22 summary adjudication.

23  
 24 The order denying plaintiff's motion for summary judgment and granting in  
 25 part and denying in part plaintiff's motion for summary adjudication is attached as



1 | Exhibit A. The judgment is attached as Exhibit B.

3 | Dated: July 30, 2008

KRING & CHUNG, LLP

By:

Ronald J. Skocypec  
J. Christopher Bennington  
Attorneys for Plaintiff  
LIBERTY MUTUAL INSURANCE  
COMPANY



# Exhibit "A"

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

## I. INTRODUCTION

This matter comes before the Court on a motion by plaintiff Liberty Mutual Insurance Company ("Plaintiff" or "Liberty") for Summary Judgment or, in the Alternative, For Summary Adjudication ("Motion"). See Docket No. 36. Defendant Michael T. Blatt ("Defendant" or "Blatt") filed an Opposition and Liberty submitted a Reply. See Docket Nos. 43, 45.

For the following reasons, the Court DENIES Liberty's Motion for Summary Judgment and GRANTS IN PART and DENIES IN PART Liberty's Motion for Summary Adjudication.

## II. BACKGROUND

In September 1998, Blatt contracted to build and sell two high-end condominiums to James Gabbert and Michael Lincoln ("the

Buyers").<sup>3</sup> Opp'n at 3; Mot. at 1. Prior to the contract, on June 9, 1996, Blatt had contracted with a foundation contractor, Schnabel Foundation Company ("Schnabel"), to build a retaining wall in order to stabilize the hillside behind the two units. Opp'n at 3.

At the time, Schnabel was insured by Liberty under a general liability policy ("the Policy"). Opp'n at 3; Mot. at 3. The Policy covered property damage and stated that Liberty's "defense obligation is triggered only by allegations of 'property damage' arising out of our named insured's [Schnabel's] work." Mot. at 6. The policy included a blanket additional insured endorsement, which expanded the policy definition of insured to include "any person or organization for whom you have agreed in writing to provide liability insurance, but coverage is limited to liability arising out of your operations or premises owned by or rented to you." *Id.* at 3 (internal quotations omitted).

On June 20, 1997, Blatt was included as an additional insured on the Policy and Liberty issued a certificate of insurance stating that "[a]ll liability policies are . . . endorsed to include Mike Blatt as an additional insured as their interest(s) may appear." Mot. at 3. (alterations in original).

Escrow on the condominiums closed in March 1999. Opp'n at 3. The Buyers then began remodeling the condominiums and discovered

<sup>3</sup> Because Liberty has moved for summary judgment, "the evidence of [Blatt] is to be believed, and all justifiable inferences are to be drawn in [his] favor." *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 456 (1992). Any disputed issue of fact is thus construed in favor of Blatt. *Id.*

1 construction defects, including problems associated with water  
2 intrusion from the hillside. *Id.*; Mot. at 1. On January 29,  
3 2002, the Buyers filed suit against Blatt in Marin County Superior  
4 Court, CV 020477. Opp'n at 1; Mot. at 2. On March 21, 2002,  
5 Blatt tendered his defense to Liberty and Liberty accepted the  
6 defense subject to a September 4, 2002, reservation of rights  
7 letter. Opp'n at 5; Mot. at 2. The letter reads, in part:

8 This responds to your firm's letters to  
9 us [Liberty] in which you tendered the  
10 defense and indemnity of your client,  
11 Michael Blatt, as an additional insured  
12 under our policy for Schnabel . . . . We  
13 have reviewed the subcontract and the  
certificates of insurance . . . and  
because the correspondence in this case  
can be read as alleging 'property damage'  
to which our policy would potentially  
apply, we will agree to share in the  
defense of Michael Blatt . . . .  
14 Mot., Ex. C.

15 In the complaint filed in Superior Court the Buyers asserted  
16 causes of action for breach of contract, negligence, fraud,  
17 negligent misrepresentation, concealment of material facts and  
18 breach of implied warranty against Blatt. Opp'n at 4; Mot. at 2.  
19 Among other construction defects, the Buyers alleged that water  
20 from the hillside had penetrated the property and there was  
21 insufficient drainage. Compl., Ex. B ¶¶ 11, 17. All of the  
22 causes of action included allegations of property damage. *Id.*  
23 Blatt, in turn, cross-complained against Schnabel, alleging that  
24 Schnabel failed to provide adequate retaining walls and drainage  
25 and this failure, in part, caused the Buyers' damages. Opp'n at  
26 2, 5; Mot. at 2.

27 The matter proceeded to trial and the jury found Blatt liable  
28

1 under two theories: negligence and breach of contract. Mot.,  
2 Bennington Decl., Ex. E. The Buyers were awarded damages of  
3 almost \$145,000.<sup>2</sup> Opp'n at 2, 5; Mot. at 2. Schnabel was found  
4 not liable to any party. Mot. at 2. In addition to the damages  
5 the court awarded the Buyers \$286,669 in attorneys' fees and  
6 \$13,634.85 in costs, totaling \$300,302.25. Opp'n at 6.

7 Because Schnabel was found not liable, Liberty declined to  
8 pay any indemnity on behalf of Blatt and Blatt therefore paid the  
9 damages of almost \$145,000 directly to the Buyers. Mot. at 3;  
10 Opp'n at 6. Liberty did, however, pay \$300,302.25 in  
11 reimbursement for the Buyers' attorneys' fees and costs and  
12 \$198,345.11 for Blatt's attorneys' fees and costs. Opp'n at 2, 6.  
13 According to Liberty, payment of these fees and costs was pursuant  
14 to a supplementary payments provisions of the Schnabel policy.  
15 Mot. at 3. These payments were made subject to the September 4,  
16 2002, reservation of rights letter. *Id.*

17 Liberty has filed the present suit in an effort to recoup the  
18 payments associated with the defense of Blatt, which totaled  
19 \$498,648.

20

21 III. DISCUSSION

22 A. Legal Standard

23 Entry of summary judgment is proper "if the pleadings,  
24 depositions, answers to interrogatories, and admissions on file,

25 \_\_\_\_\_  
26 <sup>2</sup> Almost all of the damages were awarded under the negligence  
27 claim; the jury only awarded one dollar in damages for the breach  
of contract claim. Mot., Bennington Decl., Ex. E.

28

1 together with the affidavits, if any, show that there is no  
2 genuine issue as to any material fact and that the moving party is  
3 entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).  
4 "Summary judgment should be granted where the evidence is such  
5 that it would require a directed verdict for the moving party."  
6 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). Thus,  
7 "Rule 56(c) mandates the entry of summary judgment . . . against a  
8 party who fails to make a showing sufficient to establish the  
9 existence of an element essential to that party's case, and on  
10 which that party will bear the burden of proof at trial." Celotex  
11 Corp. v. Catrett, 477 U.S. 317, 322 (1986). In addition, entry of  
12 summary judgment in a party's favor is appropriate when there are  
13 no material issues of fact as to the essential elements of the  
14 party's claim. Anderson, 477 U.S. at 247-49.

15       B. Analysis

16            1. Summary Judgment

17       Liberty argues that because a jury found Schmabel, the  
18 original insured, not liable, Liberty never had a duty to defend  
19 Blatt and may therefore recover the costs Liberty spent in  
20 defending Blatt. According to California state law, "[t]he duty  
21 to defend depends on whether there is potential indemnity  
22 liability based on facts pled in the complaint . . . . There is  
23 no duty where the only potential for liability turns on resolution  
24 of a legal question." Golden Eagle Ins. Corp. v. Gen-Fed. Ltd.,  
25 148 Cal. App. 4th 976, 993 (Ct. App. 2007) (internal quotation  
26 marks, citations and alterations omitted). Thus, Liberty asserts  
27 that "[t]he jury verdict in the underlying case has established as

1 a matter of law that there was never a potential for coverage for  
2 the claims made against Mr. Blatt." Reply at 9.

3 " [T]he insurer's duty to defend arises whenever the third  
4 party complaint and/or the available extrinsic facts suggest,  
5 under applicable law, the possibility of covered claims."  
6 Scottsdale Ins. Co. v. MV Transp., 36 Cal. 4th 643, 657 (2005)  
7 (emphasis added). "Determination of the duty to defend depends,  
8 in the first instance, on a comparison between the allegations on  
9 the complaint and the terms of the policy." Id. at 654.

10 In the underlying Superior Court action, the Buyers raised  
11 claims for breach of contract, negligence, fraud, negligent  
12 misrepresentation, concealment of material facts and breach of  
13 implied warranty against Blatt. Opp'n at 4; Mot. at 2. The  
14 Buyers alleged that, among other construction defects, water from  
15 the hillside had penetrated the property and there was  
16 insufficient drainage. Compl., Ex. B ¶¶ 11, 17.

17 The terms of the Policy issued to Schnabel by Liberty, as  
18 reiterated in the September 4, 2002, reservation of rights letter  
19 to Blatt, stated that Liberty's "defense obligation is triggered  
20 only by allegations of 'property damage' arising out of our named  
21 insured's [Schnabel's] work." Mot. at 6. The Policy defined  
22 property damage "to mean: (a) physical injury to tangible  
23 property, including all resulting loss of use of that property. . .  
24 . . . (b) Loss of use of tangible property that is not physically  
25 injured . . . ." Mot., Ex. C at 3. In addition, the policy  
26 included a blanket additional insured endorsement, which expanded  
27 the policy definition of insured to include Blatt. Mot. at 3.

1           Blatt was found liable under two claims: negligence and  
2 breach of contract. Both of these claims included allegations of  
3 property damage. In comparing the allegations in the Buyers'  
4 complaint with the terms of the Policy, the Court must determine  
5 whether, as a matter of law, either claim was covered by the  
6 insurance policy. See *Golden Eagle*, 148 Cal. App. 4th at 984  
7 (holding that "interpretation of an insurance policy is a question  
8 of law").

9           In their breach of contract claim, the Buyers asserted, in  
10 part, the following:

11           Blatt . . . breached the Purchase  
12 Agreement by failing to deliver to  
13 plaintiffs the Property in accordance  
14 with the original structural and  
15 engineering plans. . . . Blatt . . .  
16 also breached the Purchase Agreement by  
17 failing to disclose material defects as  
18 required by law. Among the defects are  
19 the following: required hold-downs were  
missing . . . ; walls were missing sill  
plate (sic) and were not built to plain;  
. . . steel beams were not correctly  
packed; welded bolts were used instead of  
through bolts; . . . improper stair  
risers; . . . vapor barriers missing; and  
insufficient drainage because of lack of  
exit routes . . . .

20 Sup. Ct. Complaint ¶¶ 10-11, Mot., Ex. D.

21           A review of this claim and theory of recovery shows that the  
22 Buyers did allege physical injury to tangible property. Liberty's  
23 Policy explicitly covered "physical injury to tangible property."  
24 Mot., Ex. C at 3. At the very least, the allegations in the  
25 breach of contract claim created the potential for coverage under  
26  
27           ///  
28

1 the Policy.<sup>3</sup> This potential is all that is required under  
2 California law to trigger a duty to defend. See Scottsdale, 36  
3 Cal. 4th at 657 (stating "(t)he insurer's duty to defend arises  
4 whenever the third party complaint and/or the available extrinsic  
5 facts suggest, under applicable law, the possibility of covered  
6 claims") (emphasis added). Thus, the Court finds, as a matter of  
7 law, that the Buyers' cause of action for breach of contract  
8 constituted a claim for physical injury to tangible property and  
9 therefore was a claim for property damage.

10 In their negligence claim, the Buyers asserted, in part, the  
11 following:

12 [Blatt] negligently . . . constructed  
13 houses for plaintiffs such that, among  
14 other things, water penetrated the  
15 Property, the Property failed to comply  
16 with applicable building and safety  
17 codes, [and] the Property was not  
properly ventilated . . . [Blatt] also  
negligently and carelessly selected and  
engaged contractors and subcontractors  
and others to perform portions of the  
work on the Property.

18 Sup. Ct. Complaint ¶ 17, Mot., Ex. D.

19 Again, upon review of this claim and theory of recovery, it  
20 is clear that the Buyers alleged physical injury to tangible  
21 property. There was, at minimum, the potential for the claims to  
22 be covered by the policy. This potential is all that is required  
23 to trigger a duty to defend. Scottsdale, 36 Cal. 4th at 657.

24  
25 <sup>3</sup> Indeed, Liberty acknowledged this potential when it agreed  
to defend Blatt. See September 4, 2002, Reservation of Rights  
letter, Mot., Ex. C (stating "because the correspondence in this  
case can be read as alleging 'property damage' to which our policy  
would potentially apply, we will agree to share in the defense of  
Michael Blatt . . .").

1 Thus, the Court finds, as a matter of law, that the Buyers' cause  
2 of action for negligence constituted a claim for physical injury  
3 to tangible property and therefore was a claim for property  
4 damage.

5 Liberty's assertion that "[t]he jury verdict in the  
6 underlying case has established as a matter of law that there was  
7 never a potential for coverage for the claims made against Mr.  
8 Blatt," Reply at 9, is, simply put, wrong.

9 The role of a jury is that of a fact-finder. See, e.g., 75A  
10 Am. Jur. 2d Trial § 602 (2007) (stating "it is the function of the  
11 jury to resolve conflicts in the evidence and determine issues of  
12 fact . . . . The jury hears the evidence and, by its verdict,  
13 settles the issues of fact . . .."); Cal. Jury Instructions, Civil  
14 General Instructions, Pre-Trial Admonitions, at 2 (Fall, 2006 Ed)  
15 (explaining that juries "must base [their] decisions . . . on the  
16 facts and the law" and "must determine the facts from the evidence  
17 received in trial"); 23B Am. Jur. Pleading & Practice Forms § 212  
18 (2007) (stating that jury members "are the sole judges of the  
19 facts in issue . . . . It is the exclusive province of the jury  
20 to weigh and consider all evidence . . . to determine the issues  
21 of fact in the case").

22 In the underlying Superior Court action, the jury found that  
23 the facts presented at trial did not give rise to any liability  
24 for Schnabel. That Schnabel's liability was put in front of a  
25 jury in the first place indicates that there were triable issues  
26 of fact. As the California Court of Appeal has noted, where "the  
27 potential for indemnity liability . . . turn[s] on disputed

1 factual issues," the insurer is "required to provide a defense at  
2 least until the facts [are] conclusively decided to show that  
3 there is no coverage and thus no duty to defend." Golden Eagle,  
4 148 Cal. App. 4th at 993 (emphasis in original). Therefore,  
5 Liberty's duty to defend was triggered.

6 Liberty's reliance on Golden Eagle, 148 Cal. App. 4th, is  
7 also misplaced. In Golden Eagle, the court granted reimbursement  
8 for defense costs because the court determined that the insured's  
9 complaint and theory of recovery were premised on claims for  
10 economic harm, not property damage. Id. at 989. Because the  
11 insurance policy covered only property damage, and not economic  
12 harm, the court found, as a matter of law, that there was no  
13 potential coverage. Id. In addition, the court found that the  
14 insurer's policy covering personal injury was outside the scope of  
15 the insured's claim, which involved "a corporate organization, not  
16 a person." Id. at 990. Thus, in Golden Eagle, the court found  
17 that as a matter of law, the claims raised by the insured did not  
18 fall under the insurance policies. As detailed above, the same  
19 cannot be said for the claims in the present case.

20 For the foregoing reasons, the Court FINDS, as a matter of  
21 law, that the Buyers' claims for breach of contract and negligence  
22 constituted claims that were potentially covered by the insurance  
23 Policy for property damage. Therefore, Liberty's duty to defend  
24 Blatt was triggered and Liberty cannot now seek reimbursement for  
25 defense funds that accrued before the jury verdict. Therefore,  
26 Liberty's Motion for Summary Judgment is DENIED.

27 ///

28

1                   2.     Summary Adjudication

2                 In the alternative to its Motion for Summary Judgment,  
3 Liberty moved for summary adjudication of three issues: (1) that  
4 Liberty is entitled to reimbursement by Blatt for any costs and  
5 fees paid to defend Blatt against claims not covered by the  
6 Policy; (2) that Liberty is entitled to reimbursement from Blatt  
7 for any costs and fees paid to defend Blatt after the jury verdict  
8 was returned; and (3) Liberty is entitled to prejudgment interest  
9 on any amounts recovered from Blatt. The Court addresses each in  
10 turn.

11                  i.     Reimbursement for Claims Not Covered by the  
12                      Policy

13                 Liberty argues that it is entitled to reimbursement of the  
14 funds used to defend Blatt against claims that were not covered by  
15 the Policy. "In a 'mixed' action, in which some of the claims are  
16 at least potentially covered and the other claims are not, the  
17 insurer has a duty to defend as to the claims that are at least  
18 potentially covered . . . but does not have a duty to defend as to  
19 those that are not . . ." Buss, 16 Cal. 4th at 47-48.  
20 Nonetheless, because of policy concerns, the California Supreme  
21 Court has also held that "in a mixed action, the insurer has a  
22 duty to defend the action in its entirety." Id. at 48. In  
23 explaining this, the Court stated: "To defend meaningfully, the  
24 insurer must defend immediately. To defend immediately, it must  
25 defend entirely. It cannot parse the claims, dividing those that  
26 are at least potentially covered from those that are not." Id. at  
27 49 (internal citations omitted).

1       Thus, "[a]s to the claims that are at least potentially  
2 covered, the insurer may not seek reimbursement for defense  
3 costs." *Id.* "As to the claims that are not even potentially  
4 covered, however, the insurer may indeed seek reimbursement for  
5 defense costs." *Id.* at 50. In determining which costs may  
6 actually be recovered, the California Supreme Court stated that  
7 only "[d]efense costs that can be allocated solely to the claims  
8 that are not even potentially covered" may be recovered. *Id.* at  
9 52.

10      The Court further held that the insurer must demonstrate by a  
11 preponderance of the evidence that certain defense costs were  
12 allocated solely to claims that were not potentially covered. *Id.*  
13 at 53. The Court noted the difficulty of this standard, stating  
14 that to carry its burden, the insurer "must accomplish a task  
15 that, if ever feasible, may be extremely difficult." *Id.* at 57-58  
16 (internal quotation marks and citations omitted). "Hence, the  
17 insurer will probably pursue the matter only in apparently  
18 exceptional cases--for example, where the defense costs the  
19 insurer may obtain in reimbursement are clear and substantial and  
20 where the assets the insured has available for reimbursement are  
21 themselves of the same sort." *Id.* at 58 (emphasis in original).

22      Blatt was found liable on two claims, breach of contract and  
23 negligence. As stated above, however, the Court finds that both  
24 of these claims were potentially covered by the insurance policy.  
25 Thus, there are no remaining claims which might be "not even  
26 potentially covered." *Buss*, 16 Cal. 4th at 52. Accordingly,  
27 summary adjudication on this issue is DENIED.

iii. Reimbursement for Costs and Fees Incurred  
After the Jury Verdict

"When the duty [to defend], having arisen, is extinguished by a showing that no claim can in fact be covered, 'it is extinguished only prospectively and not retroactively.'"

Scotsdale Ins. Co., 36 Cal. 4th at 656 (citing Buss v. Super. Ct., 16 Cal. 4th 287, 298 (1997)). Thus, Liberty was "required to provide a defense at least until the facts were conclusively decided to show that there [was] no coverage and thus no duty to defend." Golden Eagle, 148 Cal. App. 4th at 993.

Once the jury returned a finding of no liability for Schnabel, Liberty's duty to defend Blatt was extinguished. Blatt was insured only insofar as any claims against him arose under Liberty's coverage of Schnabel. Therefore, any attorneys' fees and costs that were generated after the jury found no liability for Schnabel may be recovered by Liberty.

Although the Court finds that Liberty is entitled to recover the attorneys' fees and costs, if any, that arose after the jury returned its verdict, neither Liberty nor Blatt indicates whether any of these fees and costs were in fact generated after the verdict.<sup>3</sup> Thus, although Liberty would be entitled to any of these fees, it is unclear from the parties' papers whether such fees and costs even exist. As detailed below, this issue is one for the jury. The Court therefore GRANTS Liberty's Motion for

<sup>1</sup> To be clear, the fees and costs generated by Blatt and the Buyers during the trial and paid by Liberty after the verdict, are not fees that were 'incurred after the jury verdict.'

1 Summary Judgment on the issue of whether the fees and costs  
2 generated after the jury verdict may be recovered by Liberty.  
3 This holding, however, is contingent upon the finding, by the  
4 jury, that such fees and costs even exist.

5                   iii. Prejudgment Interest

6 Finally, Liberty argues that it is entitled to prejudgment  
7 interest of 10% on all amounts recovered from Blatt. Blatt has  
8 not contested this assertion.

9                   California Civil Code section 3287 provides in pertinent  
10 part: "Every person who is entitled to damages certain, or  
11 capable of being made certain by calculation, and the right to  
12 recover which is vested in him upon a particular day, is entitled  
13 also to recover interest thereon from that day . . . ."

14                  The only issue on which the Court has granted summary  
15 adjudication is in respect to Liberty's right to recover any  
16 attorneys' fees and costs that were generated after the jury found  
17 Schnabel not liable. Thus, these fees are the only fees that  
18 would be affected by the awarding of prejudgment interest.  
19 Liberty, however, has failed to state what, if any, fees were  
20 generated after the verdict. One of the requirements of  
21 California Civil Code section 3287, as interpreted by California  
22 courts, is that section 3287 "does not authorize prejudgment  
23 interest as a matter of law where the amount of damages depends  
24 upon a judicial determination based upon conflicting evidence."  
25 Hartford Accident & Indem. Co. v. Sequoia Ins. Co., 211 Cal. App.  
26 3d 1285, 1307 (Ct. App. 1989) (internal quotation marks and  
27 citations omitted).

In the present case, Liberty has presented no evidence pertaining to post-verdict fees. Thus, the Court at this time cannot say with any certainty that the amount of damages for which Liberty requests prejudgment interest is, as it must be, certain. See *id.* (stating that "[p]rejudgment interest runs from the date when damages are certain or are capable of being calculated to a certainty") (internal citations and quotation marks omitted). For these reasons, Liberty's Motion for Summary Adjudication on the issue of prejudgment interest is DENIED.

IV. REMAINING ISSUES TO BE DECIDED BY JURY

This matter is scheduled to go to trial on November 19, 2007. In the interest of judicial economy and for the benefit of both parties, the Court FINDS that the following issues remain to be decided by the jury:

(1) Whether any attorneys' fees and/or costs were generated, in the defense of Blatt, after the jury verdict;

(2) Whether Liberty paid any of these fees and/or costs;

(3) The amount, if any, of these fees and costs.

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1 V. CONCLUSION

2 For the foregoing reasons, Plaintiff's Motion for Summary  
3 Judgment is DENIED. Plaintiff's Motion for Summary Adjudication  
4 is GRANTED IN PART and DENIED IN PART.

5

6

7 IT IS SO ORDERED.

8

9 Dated: October 26, 2007

10   
UNITED STATES DISTRICT JUDGE

# Exhibit "B"

Case 4:06-cv-02022-CW Document 97 Filed 07/01/2008 Page 1 of 2

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8 Attorneys for Defendant  
9 MICHAEL T. BLATT.

10

11 UNITED STATES DISTRICT COURT  
12 NORTHERN DISTRICT OF CALIFORNIA

13 LIBERTY MUTUAL INSURANCE COMPANY, ) Case No. C 06 2022 SC  
14 Plaintiff, ) -{PROPOSED} JUDGMENT  
15 v.  
16 MICHAEL T. BLATT,  
17 Defendant.  
18 \_\_\_\_\_)

19 The above-entitled case came before the Court on plaintiffs' Motion for  
20 Summary Judgment and Summary Adjudication on certain issues. On October  
21 26, 2007 Samuel Conti, District Court Judge presiding, Denied plaintiffs'  
22 Motion for Summary Judgment and Granted in Part and Denied in Part  
23 plaintiffs' Motion for Summary Adjudication. The Court found that there were  
24 three issues remaining to be decided by the trier of facts.

25 On March 4, 2008 at the Pre-Trial Conference before Claudia Wilken,  
26 District Court Judge presiding, the Court held that the Stipulated Facts for  
27 Trial resolved all remaining issues after the October 26, 2007 Order of Judge  
Conti.

28 After consideration of the issues and the Stipulated Facts for Trial,

---

JUDGMENT

Case 4:06-cv-02022-CW Document 97 Filed 07/01/2008 Page 2 of 2

1 IT IS ORDERED, JUDGED AND DECREED:

2 1. That Plaintiff Liberty Mutual shall recover from Defendant  
3 Michael Blatt the sum of \$1,582.50, together with pre-judgment interest at the  
4 rate of 10% per annum from September 10, 2004, or \$0.43 per day (\$1,582.50  
5 \* .10 = \$158.25/365 = \$0.43), until the judgment is paid.

6 2. That Plaintiff Liberty Mutual shall recover from Defendant  
7 Michael Blatt the sum of \$7,304.21, together with pre-judgment interest at the  
8 rate of 10% per annum from June 1, 2004, or \$2.00 per day (\$7,304.21 \* .10 =  
9 \$730.42/365 = \$2.00), until the judgment is paid.

10 3. That Plaintiff Liberty Mutual shall recover from Defendant  
11 Michael Blatt the sum of \$836.75, together with pre-judgment interest at the  
12 rate of 10% per annum from July 12, 2004, or \$0.23 per day (\$836.75 \* .10 =  
13 \$83.68/365 = \$0.23), until the judgment is paid.

14 4. That Plaintiff Liberty Mutual shall recover from Defendant  
15 Michael Blatt the sum of \$884.23, together with pre-judgment interest at the  
16 rate of 10% per annum from August 18, 2004, or \$0.24 per day (\$884.23 \* .10  
17 = \$88.42/365 = \$0.24), until the judgment is paid.

18 5. In sum, Liberty Mutual shall recover from defendant Michael  
19 Blatt the total principle sum of \$10,607.69 (Items 1-4, above) with pre-  
20 judgment interest at the rate of 10% per annum from the dates set forth in  
21 Items 1-4, above.

22 6. Plaintiff Liberty Mutual shall recover costs from defendant  
23 Michael Blatt.

24 IT IS SO ORDERED, ADJUDGED AND DECREED:

25 DATED: 7/1/08  
26

  
27 JUDGE OF THE DISTRICT COURT  
28

JUDGMENT

1                           **PROOF OF SERVICE**

2 STATE OF CALIFORNIA, COUNTY OF ORANGE

3                           I, the undersigned, am employed in the County of Orange, State of  
 4 California. I am over the age of eighteen (18) years and not a party to the  
 5 within action. My electronic mail address is mbennett@kringandchung.com.  
 6 The document was served electronically and the transmission was reported  
 7 as complete and without error.

8                           On July 30, 2008 at approximately 4:00 p.m., I served true copies of  
 9 the foregoing document(s) described as **NOTICE OF APPEAL** on the  
 10 interested parties in this action, addressed as follows:

11                          **Attorneys for Michael Blatt**

12                          Ronald D. Foreman, Esq.  
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- 19                           BY E-MAIL: By transmitting a true copy of the foregoing document(s)  
 20 to the e-mail address listed above.

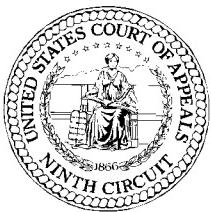
21                          I declare under penalty of perjury under the laws of the State of  
 22 California that the foregoing is true and correct.

23                          Executed on July 30, 2008, at Irvine, California.

24                          

25                          MICHELLE BENNETT





USCA DOCKET # (IF KNOWN) \_\_\_\_\_

**UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT  
CIVIL APPEALS DOCKETING STATEMENT**

PLEASE ATTACH ADDITIONAL PAGES IF NECESSARY.

<b>TITLE IN FULL:</b>  Liberty Mutual Insurance Company v. Michael T. Blatt	DISTRICT: N.D - Calif. JUDGE: Claudia Wilken	
	DISTRICT COURT NUMBER: C 06 2022	
	DATE NOTICE OF APPEAL FILED: 7/30/08	IS THIS A CROSS-APPEAL? <input type="checkbox"/> YES
	IF THIS MATTER HAS BEEN BEFORE THIS COURT PREVIOUSLY, PLEASE PROVIDE THE DOCKET NUMBER AND CITATION (IF ANY):	

**BRIEF DESCRIPTION OF NATURE OF ACTION AND RESULT BELOW:** This is an action to recover insurance benefits paid on behalf of defendant. Recovery is sought under the terms of Buss v. Superior Court (1997) 16 Cal. 4th 35 and other California Authority.

**PRINCIPAL ISSUES PROPOSED TO BE RAISED ON APPEAL:** 1) Plaintiff is entitled to recover defense fees and costs paid on behalf of defendant and 2) Plaintiff is entitled to recover fees and costs paid to other parties in the underlying litigation.

**PLEASE IDENTIFY ANY OTHER LEGAL PROCEEDING THAT MAY HAVE A BEARING ON THIS CASE (INCLUDE PENDING DISTRICT COURT POSTJUDGMENT MOTIONS):**

None.

**DOES THIS APPEAL INVOLVE ANY OF THE FOLLOWING:**

- Possibility of settlement
- Likelihood that intervening precedent will control outcome of appeal
- Likelihood of a motion to expedite or to stay the appeal, or other procedural matters (Specify) \_\_\_\_\_
- Any other information relevant to the inclusion of this case in the Mediation Program The matter has already been heard by a Ninth Circuit Mediator (Margaret Corrigan) \_\_\_\_\_

Possibility parties would stipulate to binding award by Appellate Commissioner in lieu of submission to judges

**LOWER COURT INFORMATION**

JURISDICTION		DISTRICT COURT DISPOSITION	
FEDERAL	APPELLATE	TYPE OF JUDGMENT/ORDER APPEALED	RELIEF
<input type="checkbox"/> FEDERAL QUESTION	<input checked="" type="checkbox"/> FINAL DECISION OF DISTRICT COURT	<input type="checkbox"/> DEFAULT JUDGMENT <input type="checkbox"/> DISMISSAL/JURISDICTION	<input checked="" type="checkbox"/> DAMAGES: SOUGHT \$ <u>600,000</u> AWARDED \$ <u>11,000</u>
<input checked="" type="checkbox"/> DIVERSITY	<input type="checkbox"/> INTERLOCUTORY DECISION APPEALABLE AS OF RIGHT	<input type="checkbox"/> DISMISSAL/MERITS <input type="checkbox"/> SUMMARY JUDGMENT	<input type="checkbox"/> INJUNCTIONS: <input type="checkbox"/> PRELIMINARY
<input type="checkbox"/> OTHER (SPECIFY):  <u>INTERLOCUTORY ORDER CERTIFIED BY DISTRICT JUDGE (SPECIFY):</u>	<input type="checkbox"/> INTERLOCUTORY ORDER CERTIFIED BY DISTRICT JUDGE (SPECIFY):  <input type="checkbox"/> OTHER (SPECIFY):	<input checked="" type="checkbox"/> JUDGMENT/COURT DECISION <input type="checkbox"/> JUDGMENT/JURY VERDICT <input type="checkbox"/> DECLARATORY JUDGMENT <input type="checkbox"/> JUDGMENT AS A MATTER OF LAW <input type="checkbox"/> OTHER (SPECIFY):	<input type="checkbox"/> PERMANENT <input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED  <input type="checkbox"/> ATTORNEY FEES: SOUGHT \$ _____ AWARDED \$ _____  <input type="checkbox"/> PENDING  <input checked="" type="checkbox"/> COSTS: \$ <u>719.51</u>

**CERTIFICATION OF COUNSEL****I CERTIFY THAT:**

1. COPIES OF ORDER/JUDGMENT APPEALED FROM ARE ATTACHED.
2. A CURRENT SERVICE LIST OR REPRESENTATION STATEMENT WITH TELEPHONE AND FAX NUMBERS IS ATTACHED (SEE 9TH CIR. RULE 3-2).
3. A COPY OF THIS CIVIL APPEALS DOCKETING STATEMENT WAS SERVED IN COMPLIANCE WITH FRAP 25.
4. I UNDERSTAND THAT FAILURE TO COMPLY WITH THESE FILING REQUIREMENTS MAY RESULT IN SANCTIONS, INCLUDING DISMISSAL OF THIS APPEAL.

  
SignatureJuly 30, 2008  
Date**COUNSEL WHO COMPLETED THIS FORM**

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**\*THIS DOCUMENT SHOULD BE FILED IN THE DISTRICT COURT WITH THE NOTICE OF APPEAL\***  
**\*IF FILED LATE, IT SHOULD BE FILED DIRECTLY WITH THE U.S. COURT OF APPEALS\***

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

## I. INTRODUCTION

This matter comes before the Court on a motion by plaintiff Liberty Mutual Insurance Company ("Plaintiff" or "Liberty") for Summary Judgment or, in the Alternative, For Summary Adjudication ("Motion"). See Docket No. 36. Defendant Michael T. Blatt ("Defendant" or "Blatt") filed an Opposition and Liberty submitted a Reply. See Docket Nos. 43, 45.

For the following reasons, the Court DENIES Liberty's Motion for Summary Judgment and GRANTS IN PART and DENIES IN PART Liberty's Motion for Summary Adjudication.

## II. BACKGROUND

In September 1998, Blatt contracted to build and sell two high-end condominiums to James Gabbert and Michael Lincoln ("the

Buyers").<sup>3</sup> Opp'n at 3; Mot. at 1. Prior to the contract, on June 9, 1996, Blatt had contracted with a foundation contractor, Schnabel Foundation Company ("Schnabel"), to build a retaining wall in order to stabilize the hillside behind the two units. Opp'n at 3.

At the time, Schnabel was insured by Liberty under a general liability policy ("the Policy"). Opp'n at 3; Mot. at 3. The Policy covered property damage and stated that Liberty's "defense obligation is triggered only by allegations of 'property damage' arising out of our named insured's [Schnabel's] work." Mot. at 6. The policy included a blanket additional insured endorsement, which expanded the policy definition of insured to include "any person or organization for whom you have agreed in writing to provide liability insurance, but coverage is limited to liability arising out of your operations or premises owned by or rented to you." *Id.* at 3 (internal quotations omitted).

On June 20, 1997, Blatt was included as an additional insured on the Policy and Liberty issued a certificate of insurance stating that "[a]ll liability policies are . . . endorsed to include Mike Blatt as an additional insured as their interest(s) may appear." Mot. at 3. (alterations in original).

Escrow on the condominiums closed in March 1999. Opp'n at 3. The Buyers then began remodeling the condominiums and discovered

<sup>3</sup> Because Liberty has moved for summary judgment, "the evidence of [Blatt] is to be believed, and all justifiable inferences are to be drawn in [his] favor." *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 456 (1992). Any disputed issue of fact is thus construed in favor of Blatt. *Id.*

1 construction defects, including problems associated with water  
2 intrusion from the hillside. *Id.*; Mot. at 1. On January 29,  
3 2002, the Buyers filed suit against Blatt in Marin County Superior  
4 Court, CV 020477. Opp'n at 1; Mot. at 2. On March 21, 2002,  
5 Blatt tendered his defense to Liberty and Liberty accepted the  
6 defense subject to a September 4, 2002, reservation of rights  
7 letter. Opp'n at 5; Mot. at 2. The letter reads, in part:

8 This responds to your firm's letters to  
9 us [Liberty] in which you tendered the  
10 defense and indemnity of your client,  
11 Michael Blatt, as an additional insured  
12 under our policy for Schnabel . . . . We  
13 have reviewed the subcontract and the  
certificates of insurance . . . and  
because the correspondence in this case  
can be read as alleging 'property damage'  
to which our policy would potentially  
apply, we will agree to share in the  
defense of Michael Blatt . . . .  
14 Mot., Ex. C.

15 In the complaint filed in Superior Court the Buyers asserted  
16 causes of action for breach of contract, negligence, fraud,  
17 negligent misrepresentation, concealment of material facts and  
18 breach of implied warranty against Blatt. Opp'n at 4; Mot. at 2.  
19 Among other construction defects, the Buyers alleged that water  
20 from the hillside had penetrated the property and there was  
21 insufficient drainage. Compl., Ex. B ¶¶ 11, 17. All of the  
22 causes of action included allegations of property damage. *Id.*  
23 Blatt, in turn, cross-complained against Schnabel, alleging that  
24 Schnabel failed to provide adequate retaining walls and drainage  
25 and this failure, in part, caused the Buyers' damages. Opp'n at  
26 2, 5; Mot. at 2.

27 The matter proceeded to trial and the jury found Blatt liable  
28

under two theories: negligence and breach of contract. Mot., Bennington Decl., Ex. E. The Buyers were awarded damages of almost \$145,000.<sup>2</sup> Opp'n at 2, 5; Mot. at 2. Schnabel was found not liable to any party. Mot. at 2. In addition to the damages the court awarded the Buyers \$286,669 in attorneys' fees and \$13,634.85 in costs, totaling \$300,302.25. Opp'n at 6.

Because Schnabel was found not liable, Liberty declined to pay any indemnity on behalf of Blatt and Blatt therefore paid the damages of almost \$145,000 directly to the Buyers. Mot. at 3; Opp'n at 6. Liberty did, however, pay \$300,302.25 in reimbursement for the Buyers' attorneys' fees and costs and \$198,345.11 for Blatt's attorneys' fees and costs. Opp'n at 2, 6. According to Liberty, payment of these fees and costs was pursuant to a supplementary payments provisions of the Schnabel policy. Mot. at 3. These payments were made subject to the September 4, 2002, reservation of rights letter. *Id.*

Liberty has filed the present suit in an effort to recoup the payments associated with the defense of Blatt, which totaled \$498,648.

### III. DISCUSSION

#### A. Legal Standard

Entry of summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file,

<sup>2</sup> Almost all of the damages were awarded under the negligence claim; the jury only awarded one dollar in damages for the breach of contract claim. Mot., Bennington Decl., Ex. E.

1 together with the affidavits, if any, show that there is no  
2 genuine issue as to any material fact and that the moving party is  
3 entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).  
4 "Summary judgment should be granted where the evidence is such  
5 that it would require a directed verdict for the moving party."  
6 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). Thus,  
7 "Rule 56(c) mandates the entry of summary judgment . . . against a  
8 party who fails to make a showing sufficient to establish the  
9 existence of an element essential to that party's case, and on  
10 which that party will bear the burden of proof at trial." Celotex  
11 Corp. v. Catrett, 477 U.S. 317, 322 (1986). In addition, entry of  
12 summary judgment in a party's favor is appropriate when there are  
13 no material issues of fact as to the essential elements of the  
14 party's claim. Anderson, 477 U.S. at 247-49.

15       B. Analysis

16            1. Summary Judgment

17       Liberty argues that because a jury found Schmabel, the  
18 original insured, not liable, Liberty never had a duty to defend  
19 Blatt and may therefore recover the costs Liberty spent in  
20 defending Blatt. According to California state law, "[t]he duty  
21 to defend depends on whether there is potential indemnity  
22 liability based on facts pled in the complaint . . . . There is  
23 no duty where the only potential for liability turns on resolution  
24 of a legal question." Golden Eagle Ins. Corp. v. Gen-Fed. Ltd.,  
25 148 Cal. App. 4th 976, 993 (Ct. App. 2007) (internal quotation  
26 marks, citations and alterations omitted). Thus, Liberty asserts  
27 that "[t]he jury verdict in the underlying case has established as

1 a matter of law that there was never a potential for coverage for  
2 the claims made against Mr. Blatt." Reply at 9.

3 " [T]he insurer's duty to defend arises whenever the third  
4 party complaint and/or the available extrinsic facts suggest,  
5 under applicable law, the possibility of covered claims."  
6 Scottsdale Ins. Co. v. MV Transp., 36 Cal. 4th 643, 657 (2005)  
7 (emphasis added). "Determination of the duty to defend depends,  
8 in the first instance, on a comparison between the allegations on  
9 the complaint and the terms of the policy." Id. at 654.

10 In the underlying Superior Court action, the Buyers raised  
11 claims for breach of contract, negligence, fraud, negligent  
12 misrepresentation, concealment of material facts and breach of  
13 implied warranty against Blatt. Opp'n at 4; Mot. at 2. The  
14 Buyers alleged that, among other construction defects, water from  
15 the hillside had penetrated the property and there was  
16 insufficient drainage. Compl., Ex. B ¶¶ 11, 17.

17 The terms of the Policy issued to Schnabel by Liberty, as  
18 reiterated in the September 4, 2002, reservation of rights letter  
19 to Blatt, stated that Liberty's "defense obligation is triggered  
20 only by allegations of 'property damage' arising out of our named  
21 insured's [Schnabel's] work." Mot. at 6. The Policy defined  
22 property damage "to mean: (a) physical injury to tangible  
23 property, including all resulting loss of use of that property. . .  
24 . . . (b) Loss of use of tangible property that is not physically  
25 injured . . ." Mot., Ex. C at 3. In addition, the policy  
26 included a blanket additional insured endorsement, which expanded  
27 the policy definition of insured to include Blatt. Mot. at 3.

1           Blatt was found liable under two claims: negligence and  
2 breach of contract. Both of these claims included allegations of  
3 property damage. In comparing the allegations in the Buyers'  
4 complaint with the terms of the Policy, the Court must determine  
5 whether, as a matter of law, either claim was covered by the  
6 insurance policy. See *Golden Eagle*, 148 Cal. App. 4th at 984  
7 (holding that "interpretation of an insurance policy is a question  
8 of law").

9           In their breach of contract claim, the Buyers asserted, in  
10 part, the following:

11           Blatt . . . breached the Purchase  
12 Agreement by failing to deliver to  
13 plaintiffs the Property in accordance  
14 with the original structural and  
15 engineering plans. . . . Blatt . . .  
16 also breached the Purchase Agreement by  
17 failing to disclose material defects as  
18 required by law. Among the defects are  
19 the following: required hold-downs were  
missing . . . ; walls were missing sill  
plate (sic) and were not built to plain;  
. . . steel beams were not correctly  
packed; welded bolts were used instead of  
through bolts; . . . improper stair  
risers; . . . vapor barriers missing; and  
insufficient drainage because of lack of  
exit routes . . . .

20 Sup. Ct. Complaint ¶¶ 10-11, Mot., Ex. D.

21           A review of this claim and theory of recovery shows that the  
22 Buyers did allege physical injury to tangible property. Liberty's  
23 Policy explicitly covered "physical injury to tangible property."  
24 Mot., Ex. C at 3. At the very least, the allegations in the  
25 breach of contract claim created the potential for coverage under  
26  
27           ///  
28

1 the Policy.<sup>3</sup> This potential is all that is required under  
2 California law to trigger a duty to defend. See Scottsdale, 36  
3 Cal. 4th at 657 (stating "(t)he insurer's duty to defend arises  
4 whenever the third party complaint and/or the available extrinsic  
5 facts suggest, under applicable law, the possibility of covered  
6 claims") (emphasis added). Thus, the Court finds, as a matter of  
7 law, that the Buyers' cause of action for breach of contract  
8 constituted a claim for physical injury to tangible property and  
9 therefore was a claim for property damage.

10 In their negligence claim, the Buyers asserted, in part, the  
11 following:

12 [Blatt] negligently . . . constructed  
13 houses for plaintiffs such that, among  
14 other things, water penetrated the  
15 Property, the Property failed to comply  
16 with applicable building and safety  
17 codes, [and] the Property was not  
properly ventilated . . . [Blatt] also  
negligently and carelessly selected and  
engaged contractors and subcontractors  
and others to perform portions of the  
work on the Property.

18 Sup. Ct. Complaint ¶ 17, Mot., Ex. D.

19 Again, upon review of this claim and theory of recovery, it  
20 is clear that the Buyers alleged physical injury to tangible  
21 property. There was, at minimum, the potential for the claims to  
22 be covered by the policy. This potential is all that is required  
23 to trigger a duty to defend. Scottsdale, 36 Cal. 4th at 657.

24  
25 <sup>3</sup> Indeed, Liberty acknowledged this potential when it agreed  
to defend Blatt. See September 4, 2002, Reservation of Rights  
letter, Mot., Ex. C (stating "because the correspondence in this  
case can be read as alleging 'property damage' to which our policy  
would potentially apply, we will agree to share in the defense of  
Michael Blatt . . .").

1 Thus, the Court finds, as a matter of law, that the Buyers' cause  
2 of action for negligence constituted a claim for physical injury  
3 to tangible property and therefore was a claim for property  
4 damage.

5 Liberty's assertion that "[t]he jury verdict in the  
6 underlying case has established as a matter of law that there was  
7 never a potential for coverage for the claims made against Mr.  
8 Blatt," Reply at 9, is, simply put, wrong.

9 The role of a jury is that of a fact-finder. See, e.g., 75A  
10 Am. Jur. 2d Trial § 602 (2007) (stating "it is the function of the  
11 jury to resolve conflicts in the evidence and determine issues of  
12 fact . . . . The jury hears the evidence and, by its verdict,  
13 settles the issues of fact . . .."); Cal. Jury Instructions, Civil  
14 General Instructions, Pre-Trial Admonitions, at 2 (Fall, 2006 Ed)  
15 (explaining that juries "must base [their] decisions . . . on the  
16 facts and the law" and "must determine the facts from the evidence  
17 received in trial"); 23B Am. Jur. Pleading & Practice Forms § 212  
18 (2007) (stating that jury members "are the sole judges of the  
19 facts in issue . . . . It is the exclusive province of the jury  
20 to weigh and consider all evidence . . . to determine the issues  
21 of fact in the case").

22 In the underlying Superior Court action, the jury found that  
23 the facts presented at trial did not give rise to any liability  
24 for Schnabel. That Schnabel's liability was put in front of a  
25 jury in the first place indicates that there were triable issues  
26 of fact. As the California Court of Appeal has noted, where "the  
27 potential for indemnity liability . . . turn[s] on disputed

1 factual issues," the insurer is "required to provide a defense at  
2 least until the facts [are] conclusively decided to show that  
3 there is no coverage and thus no duty to defend." Golden Eagle,  
4 148 Cal. App. 4th at 993 (emphasis in original). Therefore,  
5 Liberty's duty to defend was triggered.

6 Liberty's reliance on Golden Eagle, 148 Cal. App. 4th, is  
7 also misplaced. In Golden Eagle, the court granted reimbursement  
8 for defense costs because the court determined that the insured's  
9 complaint and theory of recovery were premised on claims for  
10 economic harm, not property damage. Id. at 989. Because the  
11 insurance policy covered only property damage, and not economic  
12 harm, the court found, as a matter of law, that there was no  
13 potential coverage. Id. In addition, the court found that the  
14 insurer's policy covering personal injury was outside the scope of  
15 the insured's claim, which involved "a corporate organization, not  
16 a person." Id. at 990. Thus, in Golden Eagle, the court found  
17 that as a matter of law, the claims raised by the insured did not  
18 fall under the insurance policies. As detailed above, the same  
19 cannot be said for the claims in the present case.

20 For the foregoing reasons, the Court FINDS, as a matter of  
21 law, that the Buyers' claims for breach of contract and negligence  
22 constituted claims that were potentially covered by the insurance  
23 Policy for property damage. Therefore, Liberty's duty to defend  
24 Blatt was triggered and Liberty cannot now seek reimbursement for  
25 defense funds that accrued before the jury verdict. Therefore,  
26 Liberty's Motion for Summary Judgment is DENIED.

27 ///

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1                   2.     Summary Adjudication

2                 In the alternative to its Motion for Summary Judgment,  
3 Liberty moved for summary adjudication of three issues: (1) that  
4 Liberty is entitled to reimbursement by Blatt for any costs and  
5 fees paid to defend Blatt against claims not covered by the  
6 Policy; (2) that Liberty is entitled to reimbursement from Blatt  
7 for any costs and fees paid to defend Blatt after the jury verdict  
8 was returned; and (3) Liberty is entitled to prejudgment interest  
9 on any amounts recovered from Blatt. The Court addresses each in  
10 turn.

11                  i.     Reimbursement for Claims Not Covered by the  
12                      Policy

13                 Liberty argues that it is entitled to reimbursement of the  
14 funds used to defend Blatt against claims that were not covered by  
15 the Policy. "In a 'mixed' action, in which some of the claims are  
16 at least potentially covered and the other claims are not, the  
17 insurer has a duty to defend as to the claims that are at least  
18 potentially covered . . . but does not have a duty to defend as to  
19 those that are not . . ." Buss, 16 Cal. 4th at 47-48.  
20 Nonetheless, because of policy concerns, the California Supreme  
21 Court has also held that "in a mixed action, the insurer has a  
22 duty to defend the action in its entirety." Id. at 48. In  
23 explaining this, the Court stated: "To defend meaningfully, the  
24 insurer must defend immediately. To defend immediately, it must  
25 defend entirely. It cannot parse the claims, dividing those that  
26 are at least potentially covered from those that are not." Id. at  
27 49 (internal citations omitted).

1       Thus, "[a]s to the claims that are at least potentially  
2 covered, the insurer may not seek reimbursement for defense  
3 costs." *Id.* "As to the claims that are not even potentially  
4 covered, however, the insurer may indeed seek reimbursement for  
5 defense costs." *Id.* at 50. In determining which costs may  
6 actually be recovered, the California Supreme Court stated that  
7 only "[d]efense costs that can be allocated solely to the claims  
8 that are not even potentially covered" may be recovered. *Id.* at  
9 52.

10      The Court further held that the insurer must demonstrate by a  
11 preponderance of the evidence that certain defense costs were  
12 allocated solely to claims that were not potentially covered. *Id.*  
13 at 53. The Court noted the difficulty of this standard, stating  
14 that to carry its burden, the insurer "must accomplish a task  
15 that, if ever feasible, may be extremely difficult." *Id.* at 57-58  
16 (internal quotation marks and citations omitted). "Hence, the  
17 insurer will probably pursue the matter only in apparently  
18 exceptional cases--for example, where the defense costs the  
19 insurer may obtain in reimbursement are clear and substantial and  
20 where the assets the insured has available for reimbursement are  
21 themselves of the same sort." *Id.* at 58 (emphasis in original).

22      Blatt was found liable on two claims, breach of contract and  
23 negligence. As stated above, however, the Court finds that both  
24 of these claims were potentially covered by the insurance policy.  
25 Thus, there are no remaining claims which might be "not even  
26 potentially covered." *Buss*, 16 Cal. 4th at 52. Accordingly,  
27 summary adjudication on this issue is DENIED.

iii. Reimbursement for Costs and Fees Incurred  
After the Jury Verdict

"When the duty [to defend], having arisen, is extinguished by a showing that no claim can in fact be covered, 'it is extinguished only prospectively and not retroactively.'"

Scotsdale Ins. Co., 36 Cal. 4th at 655 (citing Buss v. Super. Ct., 16 Cal. 4th 287, 298 (1997)). Thus, Liberty was "required to provide a defense at least until the facts were conclusively decided to show that there [was] no coverage and thus no duty to defend." Golden Eagle, 148 Cal. App. 4th at 993.

Once the jury returned a finding of no liability for Schnabel, Liberty's duty to defend Blatt was extinguished. Blatt was insured only insofar as any claims against him arose under Liberty's coverage of Schnabel. Therefore, any attorneys' fees and costs that were generated after the jury found no liability for Schnabel may be recovered by Liberty.

Although the Court finds that Liberty is entitled to recover the attorneys' fees and costs, if any, that arose after the jury returned its verdict, neither Liberty nor Blatt indicates whether any of these fees and costs were in fact generated after the verdict.<sup>9</sup> Thus, although Liberty would be entitled to any of these fees, it is unclear from the parties' papers whether such fees and costs even exist. As detailed below, this issue is one for the jury. The Court therefore GRANTS Liberty's Motion for

<sup>1</sup> To be clear, the fees and costs generated by Blatt and the Buyers during the trial and paid by Liberty after the verdict, are not fees that were 'incurred after the jury verdict.'

1 Summary Judgment on the issue of whether the fees and costs  
2 generated after the jury verdict may be recovered by Liberty.  
3 This holding, however, is contingent upon the finding, by the  
4 jury, that such fees and costs even exist.

### iii. Prejudgment Interest

Finally, Liberty argues that it is entitled to prejudgment interest of 10% on all amounts recovered from Blatt. Blatt has not contested this assertion.

California Civil Code section 3287 provides in pertinent part: "Every person who is entitled to damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day . . . ."

The only issue on which the Court has granted summary adjudication is in respect to Liberty's right to recover any attorneys' fees and costs that were generated after the jury found Schnabel not liable. Thus, these fees are the only fees that would be affected by the awarding of prejudgment interest. Liberty, however, has failed to state what, if any, fees were generated after the verdict. One of the requirements of California Civil Code section 3287, as interpreted by California courts, is that section 3287 "does not authorize prejudgment interest as a matter of law where the amount of damages depends upon a judicial determination based upon conflicting evidence." Hartford Accident & Indem. Co. v. Sequoia Ins. Co., 211 Cal. App. 3d 1265, 1307 (Ct. App. 1989) (internal quotation marks and citations omitted).

In the present case, Liberty has presented no evidence pertaining to post-verdict fees. Thus, the Court at this time cannot say with any certainty that the amount of damages for which Liberty requests prejudgment interest is, as it must be, certain. See *id.* (stating that "[p]rejudgment interest runs from the date when damages are certain or are capable of being calculated to a certainty") (internal citations and quotation marks omitted). For these reasons, Liberty's Motion for Summary Adjudication on the issue of prejudgment interest is DENIED.

IV. REMAINING ISSUES TO BE DECIDED BY JURY

This matter is scheduled to go to trial on November 19, 2007. In the interest of judicial economy and for the benefit of both parties, the Court FINDS that the following issues remain to be decided by the jury:

(1) Whether any attorneys' fees and/or costs were generated, in the defense of Blatt, after the jury verdict;

(2) Whether Liberty paid any of these fees and/or costs;

(3) The amount, if any, of these fees and costs.

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1 V. CONCLUSION

2 For the foregoing reasons, Plaintiff's Motion for Summary  
3 Judgment is DENIED. Plaintiff's Motion for Summary Adjudication  
4 is GRANTED IN PART and DENIED IN PART.

5

6

7 IT IS SO ORDERED.

8

9 Dated: October 26, 2007

10   
UNITED STATES DISTRICT JUDGE

Case 4:06-cv-02022-CW Document 97 Filed 07/01/2008 Page 1 of 2

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9 MICHAEL T. BLATT.

10

11 UNITED STATES DISTRICT COURT  
12 NORTHERN DISTRICT OF CALIFORNIA

13 LIBERTY MUTUAL INSURANCE COMPANY, ) Case No. C 06 2022 SC  
14 Plaintiff, ) -{PROPOSED} JUDGMENT  
15 v.  
16 MICHAEL T. BLATT,  
17 Defendant.  
18 \_\_\_\_\_)

19 The above-entitled case came before the Court on plaintiffs' Motion for  
20 Summary Judgment and Summary Adjudication on certain issues. On October  
21 26, 2007 Samuel Conti, District Court Judge presiding, Denied plaintiffs'  
22 Motion for Summary Judgment and Granted in Part and Denied in Part  
23 plaintiffs' Motion for Summary Adjudication. The Court found that there were  
24 three issues remaining to be decided by the trier of facts.

25 On March 4, 2008 at the Pre-Trial Conference before Claudia Wilken,  
26 District Court Judge presiding, the Court held that the Stipulated Facts for  
27 Trial resolved all remaining issues after the October 26, 2007 Order of Judge  
Conti.

28 After consideration of the issues and the Stipulated Facts for Trial,

JUDGMENT

Case 4:06-cv-02022-CW Document 97 Filed 07/01/2008 Page 2 of 2

1 IT IS ORDERED, JUDGED AND DECREED:

2 1. That Plaintiff Liberty Mutual shall recover from Defendant  
3 Michael Blatt the sum of \$1,582.50, together with pre-judgment interest at the  
4 rate of 10% per annum from September 10, 2004, or \$0.43 per day (\$1,582.50  
5 \* .10 = \$158.25/365 = \$0.43), until the judgment is paid.

6 2. That Plaintiff Liberty Mutual shall recover from Defendant  
7 Michael Blatt the sum of \$7,304.21, together with pre-judgment interest at the  
8 rate of 10% per annum from June 1, 2004, or \$2.00 per day (\$7,304.21 \* .10 =  
9 \$730.42/365 = \$2.00), until the judgment is paid.

10 3. That Plaintiff Liberty Mutual shall recover from Defendant  
11 Michael Blatt the sum of \$836.75, together with pre-judgment interest at the  
12 rate of 10% per annum from July 12, 2004, or \$0.23 per day (\$836.75 \* .10 =  
13 \$83.68/365 = \$0.23), until the judgment is paid.

14 4. That Plaintiff Liberty Mutual shall recover from Defendant  
15 Michael Blatt the sum of \$884.23, together with pre-judgment interest at the  
16 rate of 10% per annum from August 18, 2004, or \$0.24 per day (\$884.23 \* .10  
17 = \$88.42/365 = \$0.24), until the judgment is paid.

18 5. In sum, Liberty Mutual shall recover from defendant Michael  
19 Blatt the total principle sum of \$10,607.69 (Items 1-4, above) with pre-  
20 judgment interest at the rate of 10% per annum from the dates set forth in  
21 Items 1-4, above.

22 6. Plaintiff Liberty Mutual shall recover costs from defendant  
23 Michael Blatt.

24 IT IS SO ORDERED, ADJUDGED AND DECREED:

25 DATED: 7/1/08  
26

  
27 JUDGE OF THE DISTRICT COURT  
28

JUDGMENT

## **PROOF OF SERVICE**

**STATE OF CALIFORNIA, COUNTY OF ORANGE**

I, the undersigned, am employed in the County of Orange, State of California. I am over the age of eighteen (18) years and not a party to the within action. My electronic mail address is mbennett@kringandchung.com. The document was served electronically and the transmission was reported as complete and without error.

On July 30, 2008 at approximately 4:00 p.m., I served true copies of the foregoing document(s) described as **UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT CIVIL APPEALS DOCKETING STATEMENT** on the interested parties in this action, addressed as follows:

## **Attorneys for Michael Blatt**

Ronald D. Foreman, Esq.  
rdf@foremanandbrasso.com

- BY E-MAIL: By transmitting a true copy of the foregoing document(s) to the e-mail address listed above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 30, 2008, at Irvine, California.

M. Bennett

## MICHELLE BENNETT



**LIBERTY MUTUAL INSURANCE COMPANY V. MICHAEL BLATT****SERVICE LIST**

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Ronald D. Foreman, Esq. Foreman & Brasso 930 Montgomery Street, Ste. 600 San Francisco, CA 94133 <a href="mailto:rdf@foremanandbrasso.com">rdf@foremanandbrasso.com</a>	(415) 433-3475 (415) 781-8030 Fax	Defendant - Michael Blatt